Supreme Court, U.S.
FILED
MAR 23 1987
JOSEPH F. SPANIOL, JR.
CLERK

(8)

No. 86-1378

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

HANIL BANK,
Petitioner,

VS.

CARLYLE MICHELMAN, Trustee
Respondent.

OPPOSITION OF RESPONDENT CARLYLE MICHELMAN, TRUSTEE, TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DANNING, GILL, GOULD, DIAMOND
& SPECTOR
CURTIS B. DANNING*
RICHARD K. DIAMOND
1800 Century Park East
Seventh Floor
Los Angeles, California 90067
(213) 277-0077
Counsel for Respondent

**Counsel of Record*

Bowne of Los Angeles, Inc., Law Printers (213) BOWNE CO

2697

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Whether the court of appeals, in reversing the district court's reversal of the bankruptcy court's order determining its prior dismissal to have been without prejudice, has decided a special and important question of federal law in a way which is clearly in conflict with an applicable decision of this Court in an identical matter?

2. Whether the court of appeals, in reversing the district court's reversal of the bankruptcy court's order determining its prior dismissal to have been without prejudice, has acted in a manner which is in substantial conflict with a decision of another court of appeals in an identical matter?

3. Whether the court of appeals, in reversing the district court's reversal of the bankruptcy court's order determining its prior dismissal to have been without prejudice, has decided an important question of federal law which has not, but should be settled by this Court?

4. Whether the court of appeals, in reversing the district court's reversal of the bankruptcy court's order determining its prior dismissal to have been without prejudice, has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power?

TABLE OF CONTENTS

	Page
Statement of Questions Presented for Review	i
I	
Statement Regarding Parties, Opinions, Jurisdiction Below, Statutes, and Rules Involved	1
II	
Statement of the Case	2
A. Procedural History	2
B. Statement of Facts	5
III	
Summary of Argument	9
IV	
Argument	10
A. The Requested Writ Should Not Issue Because None of the Special and Important Grounds for Granting a Writ of Certiorari Exist in This Case	10
B. The Decision of the Ninth Circuit Court of Appeals is Not in Conflict With the Decisions of the Other Circuits	11
C. The Ninth Circuit's Opinion Does Not Circumvent Rule 41(b)	16
V	
Conclusion	19

TABLE OF AUTHORITIES

Cases

Page

Boazman v. Economics Lab, Inc., 537 F.2d 210 (5th Cir. 1976) 15

Brunswick Corp. v. Chrysler Corp., 408 F.2d 335 (7th Cir. 1969) 14

E.E.O.C. v. Safeway Stores, Inc., 611 F.2d 795 (10th Cir. 1979) 14

Flaksa v. Little Ricer Marine Construction Co., 389 F.2d 885 (5th Cir.), cert. denied, 392 U.S. 928 (1968) 15

Galiardi, In re, 745 F.2d 335 (5th Cir. 1984) 14, 15

Graves v. Kaiser Aluminum & Chemical Co., 528 F.2d 1360 (5th Cir. 1976) 15

Huey v. Teledyne, 608 F.2d 1234 (9th Cir. 1979)... 11

Jones & Guerrero Co., Inc. v. Sealift Pacific, 650 F.2d 1072 (9th Cir. 1981) 11, 12

Judkins v. Beech Aircraft Corp., 723 F.2d 818 (11th Cir. 1984) 15

Kincade v. Jeffery-DeWitt Insulation Corporation, 242 F.2d 328 (5th Cir. 1957) 14

La Societe Anonyme des Parfums Le Galion v. Jean Patou, Inc., 495 F.2d 1265 (2d Cir. 1974) 17

Madesky v. Campbell, 705 F.2d 703 (3d Cir. 1983) 15

Mullins v. Nickel Plate Mining Co., Inc., 691 F.2d 971 (11th Cir. 1982) 14

Navarro v. Chief of Police of Des Moines, Iowa, 523 F.2d 214 (8th Cir. 1975) 15

Pattiz v. Schwartz, 386 F.2d 300 (8th Cir. 1968) ... .11, 13, 14

TABLE OF AUTHORITIES

CASES

Page

Scola v. Boat Frances, R., Inc., 618 F.2d 153 (1st Cir. 1980) 14, 15

Security Mut. Cas. Co. v. Century Cas. Co., 621 F.2d 1062 (10th Cir. 1980) 11

Talbert v. Leighton, 623 F.2d 585 (9th Cir. 1980) .. 15

Thomas v. Gerber Productions, 703 F.2d 353 (9th Cir. 1983) 15

United States v. 60.22 Acres of Land, etc., 638 F.2d 1176 (9th Cir. 1980) 12, 13

United States v. Thompson, 114 F. Supp. 874 (S.D.N.Y. 1953) 17, 18

Warner v. City of Bay St. Louis, 526 F.2d 1211 (5th Cir. 1976) 11

Webber v. Eye Corp., 721 F.2d 1067 (7th Cir. 1983) 15

Witt v. United States, 681 F.2d 1144 (9th Cir. 1982) 15

Zaroff v. Holmes, 379 F.2d 875 (D.C. Cir. 1967) ... 18

Rules

Bankruptcy Rules, Rule 924 ..... 3, 11

Bankruptcy Rules, Rule 9024 3

Federal Rules of Civil Procedure, Rule 41(b) 16, 17, 18

Federal Rules of Civil Procedure, Rule 54 14

Federal Rules of Civil Procedure, Rule 60 3

Federal Rules of Civil Procedure, Rule 60(a) 2, 9, 11, 12, 13, 14, 16, 19

Local Rules of United States District Court for the Central District of California, Local Rule 12.4 .. 18

TABLE OF AUTHORITIES

RULES

	Page
Rules of the Supreme Court of the United States, Rule 17	10
Rules of United States Bankruptcy Court, Rule 905(d)(3)	7
Rules of United States District Court, Rule 28(b)	7

Statutes

Guam Code of Civil Procedure, Sec. 337	12

Textbooks

5 American Law Reports Fed. pp. 897, 899	17
5 Moore's Federal Practice, Sec. 41.11[2] (2nd ed. 1984)	17

No. 86-1378

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

HANIL BANK,
Petitioner,

VS.

CARLYLE MICHELMAN, Trustee
Respondent.

OPPOSITION OF RESPONDENT CARLYLE MICHELMAN, TRUSTEE, TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondent Carlyle Michelman, Trustee, respectfully opposes the petition filed by Hanil Bank for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit in this case.

I.

STATEMENT REGARDING PARTIES, OPINIONS, JURISDICTION BELOW, STATUTES, AND RULES INVOLVED

Respondent concurs with the position taken by petitioner at pages ii, 1 and 2 of its petition relative to the identity of interested parties, the prior opinions, the basis

for jurisdiction of this Court and the statutes and rules involved in this matter.

II.

STATEMENT OF THE CASE

A. Procedural History.

By the opinion sought to be reviewed, the Ninth Circuit Court of Appeals reinstated the order of the bankruptcy court clarifying that its Judgment of Dismissal had at all times been intended to be, and was, a dismissal without prejudice. The Ninth Circuit found ample evidence in the record to support the finding that the trial court's intention was to dismiss without prejudice and concluded that it was an appropriate exercise of the court's authority under Rule 60(a) of the Federal Rules of Civil Procedure (hereinafter "FRCP 60(a)") to clarify the judgment to reflect the court's original intention which had been inadvertently left ambiguous.

On August 14, 1981, involuntary bankruptcy cases were commenced against Harvard M. Jee (hereinafter the "debtor") and Petrous Industries, Inc., one of the debtor's wholly owned companies, and, thereafter, respondent Carlyle Michelman was appointed trustee in the cases (hereinafter the "trustee").

On October 1, 1981, an adversary proceeding was commenced by the Korea Exchange Bank (hereinafter "KEB") which sought to enjoin petitioner Hanil Bank, Ltd. (hereinafter "Hanil") from holding a foreclosure sale of a controlling interest in the First State Bank which Hanil held as collateral for a loan to the debtors on the grounds that the pledge to Hanil constituted a fraudulent conveyance. KEB joined the trustee as a defendant

in the adversary proceeding (E.R. 1).[1] On October 29, 1981, the trustee, *in propria persona,* responded to the KEB complaint and filed a cross-complaint seeking to enjoin the sale and recover the fraudulent conveyance (E.R. 31). Hanil responded to the cross-complaint on November 17, 1981 (E.R. 50). On November 25, 1981, the bankruptcy court entered its Order re (1) Preparation and Filing of Joint Pretrial Order; (2) Vacating Trial Date; and (3) Re-setting Trial Date (E.R. 58). It was the bankruptcy court's normal practice to set all disputed matters for trial by this order and to use the "trial" date as a status conference if the matter was anything but a routine action such as a simple complaint for relief from the automatic stay. No appearance was made by the trustee's counsel at the February 4, 1982 hearing and the matter was ordered dismissed (R.T., February 4, 1982). The court entered its Judgment of Dismissal, in the form prepared by Hanil's counsel, on February 18, 1982 (E.R. 68).

On December 21, 1982, the trustee filed his Motion for Order Clarifying and Specifying that Dismissal of Cross-Claim was Without Prejudice or, in the Alternative, for an Order Vacating Judgment of Dismissal of the Cross-Claim (hereinafter the "Motion to Clarify") (E.R. 72). The Motion to Clarify sought a determination that the dismissal was without prejudice or to vacate the judgment pursuant to Rule 60 of the Federal Rules of Civil Procedure as made applicable to the proceeding by former Bankruptcy Rule 924.[2] At a hearing on the Motion to

---

[1]E.R. refers to the Excerpt of Record filed in the court of appeals. R.T. refers to the Reporter's Transcript of hearings held in the bankruptcy court, and is followed by the date on which the hearing was held.

[2]Substantially identical provisions are now contained in Bankruptcy Rule 3024 which became effective August 1, 1983.

Clarify held on January 6, 1983, the Bankruptcy Judge, Judge Robert L. Ordin, indicated from the bench his intention to deny the motion (R.T., January 26, 1983).

On January 28, 1983, prior to the entry of any order on the Motion to Clarify, the trustee filed his Motion to Reopen Hearing and for Reconsideration of Trustee's Motion to Clarify (E.R. 265). This motion sought to have the bankruptcy judge reconsider his orally announced ruling on the Motion to Clarify to consider whether his intention in making the original Judgment of Dismissal was clearly expressed in the written judgment. After taking the matter under submission, on March 4, 1983, the bankruptcy judge wrote to counsel announcing his decision, upon reconsideration, to grant the Motion to Clarify because he had originally intended the Judgment of Dismissal to be a dismissal without prejudice (E.R. 583). Thereafter, before a written order was entered, Hanil moved for reconsideration. After argument, Hanil's motion for reconsideration was taken under submission (R.T., March 25, 1983). Prior to its decision, Bankruptcy Judge Ordin, who had heard all of the previous matters, retired.

The case was then transferred to Bankruptcy Judge John D. Ayer, who, after considering all of the pending motions and hearing argument, granted the Motion to Clarify and entered the Order Granting Motion for Order Clarifying and Specifying that Dismissal of Cross-Complaint Was Without Prejudice and Judgment of Dismissal of Cross-Complaint Was Without Prejudice (hereinafter the "Order Clarifying") which was the subject of the appeal to the district court (E.R. 525, 588).

On April 5, 1984, Hanil filed its Notice of Appeal to the district court (E.R. 564). On February 11, 1985, the district court held a hearing on the appeal. On March 7, 1985, the district court entered its Judgment of Reversal

(E.R. 587). The trustee brought a timely appeal from the district court's Judgment of Reversal to the Ninth Circuit Court of Appeals which entered its opinion reversing the district court on September 9, 1986. Hanil's motion for rehearing was denied on November 18, 1986. It is this opinion which is the subject of Hanil's petition to this Court.

B. Statement of Facts.

Much of the factual basis necessary to the determination of this petition is the procedural history of the litigation set forth above. However, an understanding of the factual context of the underlying litigation is also helpful to a consideration of the issues presented. Prior to the commencement of the Chapter 7 cases on August 14, 1981, the debtor owned or controlled approximately 85% of the stock of First State Bank (hereinafter the "stock") which was valued at between ten and fifteen million dollars. The stock was pledged by the debtor to Hanil to secure the pre-existing debts of third parties. Hanil obtained relief from the automatic stay to foreclose upon the stock on October 28, 1981 (E.R. 165, 225). In the interim, KEB had commenced the adversary proceeding which gives rise to this petition (E.R. 1). An order dismissing KEB's complaint pursuant to stipulation with the trustee was entered on November 16, 1981 (E.R. 26), and the restraint imposed by another stipulation was vacated upon Hanil's motion granted by order entered on December 21, 1981 (E.R. 60). Thus, after December 21, 1981, all of the bars to the foreclosure sale of the stock had been eliminated.

At this juncture, counsel for the trustee and Hanil discussed dismissal of the cross-claim so that the case could be litigated in a subsequent action which would not involve requests for injunctive relief and which could

proceed after the parties had had an opportunity to investigate and develop more thoroughly the underlying facts. Counsel also discussed arrangements for the sale of the stock. Although counsel for the trustee sought to have the stock sold by the trustee under the supervision of the bankruptcy court, Hanil insisted on conducting the sale itself as it expected to be the high bidder at the sale and had taken substantial steps to arrange the transfer of control of First State Bank to Hanil, including obtaining regulatory approvals which were valid for only a limited time (E.R. 91-94, 276-284, 287,291).

In this context, the trustee did not appear in court on February 4, 1982. That hearing was the first held in the case and, given the nature of the matter and the factual complexities involved, it would not normally have been the time at which trial would have occurred. At the hearing, the following exchange occurred between Hanil's counsel and the court:

> THE COURT: "What is going on in the cross-complaint? What is happening?"
>
> MR. MINNICK: "In a word, nothing."[3]
>
> THE COURT: "Well, I seem to have a trial here — the cross-claim of Carlyle Michelman who is now represented by a highly experienced bankruptcy firm, David Gil [sic]. There is no pre-trial order and that is not typical of that office so *I assume there has got to be some explaination* [sic] *I don't know about.*"
>
> • • • •
>
> MR. MINNICK: "In fairness to the trustee there was a conversation in mid Decmber [sic] and in that

---

[3]See comment in note 5 below regarding word "nothing" at this point.

conversation there was reference made to a possibility of *a need to continue this trial so that discovery could be performed by the parties."*

THE COURT: *"Well, I can only order continuing the trial."*[4]

MR. MINNICK: "Our response to that was, you know, send some stipulation over, and *we would not oppose a continuance and we would not oppose a voluntary dismissal coupled with the institution of a new lawsuit* which might be in a difficult [sic] procedural setting to go forward when the original complaint has been dismissed as this one. We made it very clear we are not waiving anything and that was the last we have heard."

THE COURT: *"There is nothing before me today because the cross-claim* [sic] *is not in court.* There is no pre-trial order that has been filed on the matter. The cross-complaint is dismissed. *Prepare an appropriate order which sets forth those things."* (R.T., February 4, 1982, p. 5) (emphasis added).[5]

Counsel for Hanil then lodged a judgment reciting that the cross-claim was "dismissed pursuant to Local Rule 28(b) and Bankruptcy Rule 905(d)(3)"[6] and this judg-

---

[4]See comment in note 5 below regarding word "only" at this point.

[5]It should be noted that two versions of the Reporter's Transcript of the February 4, 1982 proceedings were prepared. Except as otherwise noted, the trustee herein refers to the Transcript as originally prepared. The second version differs from the first in that, among other things, the main speaker for Hanil is identified as Mr. Dam, rather than Mr. Minnick; the word "nothing" is deleted at p. 3, l. 10 and the word "only" is deleted at p. 5, l. 10.

[6]Presumably, these were references to Rule 28(b) of the Local Rules of the United States District Court and Local Rule 905(d)(3) of the United States Bankruptcy Court.

ment was entered by the court on February 18, 1982 (E.R. 68). On the previous day, Hanil had conducted its foreclosure sale of the stock and acquired by credit bid a controlling interest in the First State Bank (R.T., February 17, 1983, p. 12, l. 12-21). Notwithstanding their unsupported protestations of prejudice, it is clear that Hanil always intended to acquire the Bank and none of the lower courts have ever found Hanil to have suffered prejudice.

On December 21, 1982, the trustee filed his Motion to Clarify (E.R. 72). After first disagreeing on other grounds, the trial court ruled that the Motion to Clarify should be granted since it was its intention at the "trial" on February 4, 1982, and at all material times, to dismiss without prejudice (E.R. 525, 564). These facts are explicitly set forth in a letter to counsel announcing that court's decision signed by Judge Ordin on March 4, 1983 (E.R. 583).

Hanil next moved to reopen the hearing on the Motion to Clarify before the trial court (E.R. 359). Judge Ordin indicated no change of position but took the matter under submission (R.T., April 21, 1983). He retired before entering an order and his successor, Judge Ayer, correctly found that Judge Ordin knew that he intended at all times to enter a dismissal without prejudice and that he did precisely that by the judgment entered on February 18, 1982 (E.R. 525, 564).

On appeal, the district court concluded that, notwithstanding the bankruptcy judge's intention as revealed in the record and as expressly stated in his letter ruling, the Judgment of Dismissal had to be considered as an adjudication on the merits. Therefore, the district court ordered the order of the bankruptcy court vacated and the trustee's motion denied (E.R. 587).

The Ninth Circuit Court of Appeals reversed. It reviewed the record and found numerous indications, both in the transcript of the February 4, 1982 hearing and in the subsequent letter ruling, supporting the finding that the bankruptcy court's intent had always been to dismiss without prejudice. It therefore held that the use of FCRP 60(a) to make the entered judgment accurately reflect the court's stated intention was proper.

III.

SUMMARY OF ARGUMENT

The Ninth Circuit Court of Appeals has held that FCRP 60(a) provides a bankruptcy court with authority to clarify that a judgment of dismissal constitutes a dismissal without prejudice if that was the trial court's original intention at the time of making the order and if the finding of that original intent is supported by evidence in the record and is not clearly erroneous. In this matter, the court of appeals found ample evidence both in the record of the hearing at which the dismissal was announced and in subsequent statements by the trial judge to support the court's finding.

In so ruling, the Ninth Circuit has adopted the same rule as other courts of appeals with respect to the appropriate scope of FCRP 60(a). In requiring a review of the record to support a finding of the trial court's intent, the Ninth Circuit has provided practical and appropriate limitations on the use of FCRP 60(a) which are consistent with fair and efficient judicial administration. By allowing FCRP 60(a) to be used to make a judgment reflect what was undisputedly the trial judge's true intent, the Ninth Circuit has adopted a rule which preserves a balance between the policies of finality of judgments and the promotion of substantial justice.

The Ninth Circuit's opinion neither directly conflicts with the decisions of other circuits and this Court, nor is it an instance of an abuse requiring this Court's intervention to supervise the lower court or settle a new area of law. Rather, it is an example of sound judicial administration which is consistent with prior precedents.

IV.

ARGUMENT

A. The Requested Writ Should Not Issue Because None of the Special and Important Grounds for Granting a Writ of Certiorari Exist in This Case.

The petition fails to satisfy the standard governing review on certiorari set forth in Rule 17 of the Rules of the Supreme Court of the United States. That rule provides, in pertinent part, as follows:

> "A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor."

For the writ to be granted in this case, the petitioner must establish that the court of appeals has rendered a decision which is clearly in conflict with the decision of another federal court on the same matter, has decided an important question of federal law which has not, but should be, settled by this Court, or has acted in a manner so far removed from the accepted and usual course as to require this Court's supervision.

Upon careful examination, the issues of federal law raised by the petition are illusory. The supposed conflicts among the circuits are reconcilable in each instance. In fact, the Ninth Circuit Court of Appeals has acted consistently with the prior decisions of the circuits.

B. The Decision of the Ninth Circuit Court of Appeals is not in Conflict with the Decisions of the Other Circuits.

The federal courts have always had the power and duty to correct judgments containing clerical errors or judgments issued due to inadvertence or mistake. *Security Mut. Cas. Co. v. Century Cas. Co.,* 621 F.2d 1062, 1065 (10th Cir. 1980) (correction unnecessary because judgment held not to bar subsequent action). This power includes the power to correct a dismissal with prejudice to one without prejudice if that was the court's original intent. *State of Maryland v. Baltimore Transit Co.,* 38 F.R.D. 340 (D. Md. 1965).

The bankruptcy court's authority to clarify its judgment is provided for by FRCP 60(a) as made applicable to the bankruptcy court by former Bankruptcy Rule 924. The circuits have uniformly held under FRCP 60(a) that the court at any time may correct errors in its judgment created by mistakes, oversights or omissions that cause the judgment to fail to reflect the court's actual intention even though such mistakes were not made by the clerk. *Jones & Guerrero Co., Inc. v. Sealift Pacific,* 650 F.2d 1072 (9th Cir. 1981); *Huey v. Teledyne,* 608 F.2d 1234 (9th Cir. 1979); *Warner v. City of Bay St. Louis,* 526 F.2d 1211, 1212 (5th Cir. 1976); *Pattiz v. Schwartz,* 386 F.2d 300 (8th Cir. 1968).

In *Huey v. Teledyne, Inc., supra,* the Ninth Circuit Court of Appeals decided the precise issue raised in this case in approving an order correcting a dismissal without prejudice to one with prejudice under FRCP 60(a). In that case, one month after entering a dismissal without prejudice for want of prosecution, the district court entered an order amending the judgment to be a dismissal *with* prejudice in order that it conform with the court's intended ruling. Finding the amended order to have been

made so that the judgment accurately reflected the earlier ruling, the court of appeals held the district court's action to be a proper exercise of its authority under FRCP 60(a). The court thus held that, under FRCP 60(a), the question of whether a judgment operates as an adjudication on the merits is subject to correction so that the court's actual intentions are correctly reflected.

In *Jones & Guerrero Co., Inc., v. Sealift Pacific, supra,* the District Court of Guam, more than one year after having dismissed a removed action for want of jurisdiction, set aside its dismissal order and ordered the case remanded to the Guam Superior Court on the grounds it had always been its intention to order the matter remanded rather than dismissed. This remand order was upheld under FRCP 60(a) by the Ninth Circuit Court of Appeals with the following statement:

> "The rule [FRCP 60(a)] may be used to make an order reflect the actual intentions of the court, plus necessary implications." *Id.,* 650 F.2d at 1074 (citations omitted).

Although the dismissal order in the *Jones & Guerrero* case was based on a lack of jurisdiction and thus was a dismissal without prejudice, the effect was to preclude further litigation due to the expiration of the applicable four-year statute of limitations contained in Section 337 of the Guam Civil Procedure Code. Thus, the court in the *Jones & Guerrero* case determined that, under FRCP 60(a), a prejudicial dismissal can be corrected to allow further prosecution of an action if that was the original intention of the court.

Similarly, in *United States v. 60.22 Acres of Land, etc.,* 638 F.2d 1176 (9th Cir. 1980), the Ninth Circuit Court of Appeals interpreted a 1938 condemnation judgment some 22 years later to effectuate the trial court's original

intention. The court examined the record of the 1938 proceeding, including the jury instructions, and interpreted the prior judgment as granting an unrestricted flowage easement, regardless of the intervening lack of use of the easement by the government. In reversing the district court, the court of appeals stated the proper rule as follows:

> "It is our responsibility to construe a judgment so as to give effect to the intention of the court, not to that of the parties." 638 F.2d at 1178.

This is not an approach which has been limited to the Ninth Circuit. The Eighth Circuit has held that FRCP 60(a) may be used to prevent a judgment from having an unintended prejudicial effect. In *Pattiz v. Schwartz, supra,* after settlement of a suit on an accelerated promissory note by a stipulated dismissal, a new suit on subsequent defaults was defended on res judicata grounds. On plaintiff's motion made almost four years after the dismissal, the court corrected the record to reflect the filing of an amended complaint which did not invoke an acceleration which had been delivered to the judge but never filed. The Eighth Circuit, per then-Circuit Judge Blackmun, approved, stating:

> "[T]he trial court possessed the power, under Rule 60(a), Fed.R.Civ.P., to enter [the] order .... *The intent of the parties and, indeed, of the trial court itself, is clear .... The district court by its order recognized only what was understood, what was intended, what was agreed, and what the court itself had accepted as the resolution of the litigation then pending.* No prejudice could possibly result from what the court did." 386 F.2d at 303 (emphasis supplied, citations omitted).

The circuit court of appeals for several other circuits have also enunciated the court's powers to interpret its judgment in plain language. *See, e.g., Kincade v. Jeffery-DeWitt Insulation Corporation,* 242 F.2d 328 (5th Cir. 1957); *Brunswick Corp. v. Chrysler Corp.,* 408 F.2d 335 (7th Cir. 1969); *E.E.O.C. v. Safeway Stores, Inc.,* 611 F.2d 795 (10th Cir. 1979).

In the present case, the Ninth Circuit Court of Appeals interpreted the scope of FRCP 60(a) consistently with its use in the other circuits. The court found that there was clear evidence in the record of the original proceeding as well as in the trial judge's explicit statements in court that his original intention was to dismiss without prejudice. Based upon this finding, the court of appeals upheld the bankruptcy court's exercise of authority under FRCP 60(a) to make the judgment entered consistent with the trial judge's intent.

Petitioner has cited the cases of *Mullins v. Nickel Plate Mining Co., Inc.,* 691 F.2d 971 (11th Cir. 1982), *Scola v. Boat Frances, R., Inc.,* 618 F.2d 153 (1st Cir. 1980), and *In re Galiardi,* 745 F.2d 335 (5th Cir. 1984) for the proposition that the Ninth Circuit has adopted an aberrant interpretation of FRCP 60(a). However, the rule of decision in these cases is not in conflict with the holding of the Ninth Circuit in this matter. In *Mullins v. Nickel Plate Mining Co., Inc., supra,* the Eleventh Circuit held it to be reversible error to use FRCP 60(a) to retroactively amend an order of partial adjudication of issues by inclusion of specific findings of finality and urgency so that it constituted a separate, final judgment pursuant to FRCP 54 after the time to appeal and run. The Eleventh Circuit cited with approval the decision in *Pattiz v. Schwartz, supra,* in defining the scope of FRCP 60(a), but found the retroactive effect of the order before it, which

eliminated the right to appeal from the judgment, to be abusive.

In the present case, there has been no retroactive effect and, as evidenced by the proceedings to date, there has been no loss of a right to appeal. Indeed, this argument, which has been raised for the first time on this petition, is totally meritless. It is beyond question that an appeal from a dismissal without prejudice by Hanil would have failed as a dismissal with prejudice, had it been intended, would have been an abuse of discretion. *Flaksa v. Little Ricer Marine Construction Co.*, 389 F.2d 885, 887-8 (5th Cir.), cert. denied, 392 U.S. 928 (1968). *See also, Judkins v. Beech Aircraft Corp.*, 723 F.2d 818, 820 (11th Cir. 1984); *Webber v. Eye Corp.*, 721 F.2d 1067, 1069 (7th Cir. 1983); *Madesky v. Campbell*, 705 F.2d 703, 704 (3d Cir. 1983); *Witt v. United States*, 681 F.2d 1144, 1149 (9th Cir. 1982); *Boazman v. Economics Lab, Inc.*, 537 F.2d 210, 212 (5th Cir. 1976); *Graves v. Kaiser Aluminum & Chemical Co.*, 528 F.2d 1360, 1361 (5th Cir. 1976); *Navarro v. Chief of Police of Des Moines, Iowa*, 523 F.2d 214, 218 (8th Cir. 1975); *Thomas v. Gerber Productions*, 703 F.2d 353, 356 (9th Cir. 1983), *Talbert v. Leighton*, 623 F.2d 585 (9th Cir. 1980).

The case of *In re Galiardi, supra*, also relied upon by Hanil to demonstrate a conflict among the circuits, is actually strikingly similar in its reasoning and holding to this case. The Fifth Circuit held that in the absence of *any* indication in the record of the court's original intent, it was error to amend an order transferring venue to another district to include the grounds for the transfer.

Similarly, in *Scola v. Boat Frances, R. Inc., supra*, also cited by petitioner, the court refused to permit a judgment to be amended to retroactively delete prejudgment interest which had erroneously been added by the clerk to the jury verdict. The court held that the addition of

interest constituted an error of law not correctable as a clerical error since an erroneous exercise of discretion was involved. As in each of the cases relied upon by petitioner, the record contained no evidence of the court's true intention.

In the present case, the Ninth Circuit has examined the record at length and found ample evidence of the trial judge's original intent. The Ninth Circuit's opinion, like the opinions of the First, Fifth and Eleventh Circuits, requires such a record and, if it exists, permits reliance upon it.

Hanil has mischaracterized the Ninth Circuit's opinion. The petitioner is dissatisfied with the inferences drawn and the findings reached regarding the trial court's intent. However, this dissatisfaction is not reason to overlook the important distinction between disagreeing over what a trial court finds from conflicting evidence and stating that the court acted without requiring any evidence. The Ninth Circuit's opinion permits FRCP 60(a) to be used to clarify a judgment to specify that it is without prejudice if, and only if, evidence of that intent is found in the record and the court's finding as to the trial court's original intention is not clearly erroneous. This is consistent with the decisions in all of the other circuits and does not conflict with any opinion of this Court.

C. The Ninth Circuit's Opinion Does Not Circumvent Rule 41(b).

Hanil seeks an order directly contrary to the bankruptcy court's expressed intention as to the nature and quality of the dismissal. To support this position, Hanil argues that Rule 41(b) requires that a dismissal for "failure of prosecution," in all events and in all circumstances, with no further inquiry, constitutes a permanent

bar to further litigation unless the magic phrase "without prejudice" is expressly included in the written judgment.

However, the Federal Rules are not as inflexible as Hanil argues. "Rule 41(b) clearly places dismissal for failure to prosecute in the district court's discretion." 5 *Moore's Federal Practice* § 41.11[2] (2d ed. 1984). That discretion judicially tempers the bare language of Rule 41(b). Annot., 5 ALR Fed. 897, 899.

In *La Societe Anonyme des Parfums Le Galion v. Jean Patou, Inc.*, 495 F.2d 1265 (2d Cir. 1974), two successive trademark suits were each dismissed for lack of prosecution over a nine-year period. On appeal from the judgment for defendant in a third action, the appellate court, noting that the dismissal of the first suit included no qualifications or specifications, nevertheless refused to apply Rule 41(b) to preclude relitigation. The court held that the trial judge's belief that the first case had been dismissed without prejudice as well as the continuing nature of trademark infringement would override the presumption of FRCP 41(b).

As in *La Societe Anonyme, supra*, it was proper for the bankruptcy court to review the entire record in clarifying the judgment because:

> "[F]acts suggest there may be evidence outside the face of the order plainly indicating the dismissal to be without prejudice, [and] the [trial] court should explore this question. . . " 495 F.2d at 1275.

The citations (or, more precisely, miscitations) in the Judgment of Dismissal to the local rules are a further indication of the nonprejudicial nature of the dismissal. This was the case in *United States v. Thompson*, 114 F. Supp. 874 (S.D.N.Y. 1953). A suit by the United States on a bond was twice dismissed without prejudice for lack of prosecution and then reinstated upon a showing of

good cause under a local court rule. The case was dismissed a third time and not reinstated. Upon the filing of a new action, the court rejected the argument that the third dismissal was with prejudice by reason of Rule 41(b) because reference to the local rules was an "other specification" taking the judgment outside Rule 41(b). The court held Rule 41(b) should not be read to cancel the terms of a local rule even though the local rule did not specify that such dismissals were without prejudice. *Accord, Zaroff v. Holmes*, 379 F.2d 875, 877 (D.C. Cir. 1967) (Rule 41(b) is not dispositive of the construction to be placed upon local rules governing pretrial proceedings and diligent prosecution, regardless of the fact such rules do not address the prejudicial nature of the dismissal).

Although the then-applicable local rules of the United States District Court for the Central District of California and the United States Bankruptcy Court for the Central District of California did not specify whether dismissals pursuant to them were prejudicial or not, the current version of Local Rule 12.4 specifically provides that a dismissal for want of prosecution is without prejudice unless otherwise stated. This may be indicative of their proper construction. At any event, the local rules at issue in this case are similar to those discussed in *Thompson* and *Zaroff*, which resulted in nonprejudicial dismissals. Inasmuch as this effects a result directly opposite to Hanil's reading of Rule 41(b), it is apparent that Hanil is incorrect when it argues that Rule 41(b) is a rule of substantive law which local court rules cannot qualify or modify. The dismissal as entered in this case was, as intended, a dismissal without prejudice. Therefore, the Order Clarifying was proper and the Ninth Circuit Court of Appeals' opinion reinstating that order was appropriate.

V

CONCLUSION

Petitioners have failed to establish that the court of appeals has decided an important issue of federal law in a manner which is clearly in conflict with applicable decisions of this Court. Neither have they established that the court of appeals has rendered a decision which is clearly in conflict with the decision of another federal court of appeals on exactly the same matter or that there has been any deviation from established authority. To the contrary, the Ninth Circuit has reached a holding which allows FRCP 60(a) to be used to make a judgment express the true intention of the court if that intention is determinable by reference to the record. This standard provides appropriate guidelines for the use of FRCP 60(a). Based upon the foregoing reasons, the petition for writ of certiorari should be denied.

DATED: March 19, 1987

Respectfully submitted,

DANNING, GILL, GOULD, DIAMOND & SPECTOR

CURTIS B. DANNING*
RICHARD K. DIAMOND

By_____

CURTIS B. DANNING
Counsel for Respondent
Carlyle Michelman, Trustee

* *Counsel of Record*

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On March 19, 1987, I served the within Opposition of Respondent Carlyle Michelman, trustee, to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, October Term, 1986;

on the Petitioner in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

Lillick, McHose & Charles
M. David Minnick
725 South Figueroa Street
Suite 1200
Los Angeles, CA 90017

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on March 19, 1987, at Los Angeles, California

Ce Ce Medina

CE CE MEDINA